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TABLE OF CASES, TEXTBOOKS AND STATUTES CITED.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1925.

No. 41.

SAMUEL FRESHMAN, Petitioner,

versus

W. S. ATKINS, Respondent.

BRIEF FOR PETITIONER.

Neither of the opinions of the courts below, so far as we have been able to learn, has been officially reported. The opinion of the district court is published as **In re Freshman,** 290 Fed. 609; the opinion of the circuit court of appeals is published as **Freshman v. Atkins,** 294 Fed. 867.

The order of the district court denying petitioner his discharge in part, was entered June 9, 1923 (R.15); motion for rehearing was overruled by the district court June

18, 1923 (R. 35). On appeal, the district court's orders were affirmed by judgment entered November 27, 1923 (R. 43), petition for rehearing being overruled by the circuit court of appeals on December 24, 1923 (R. 50). Petition for certiorari was granted by this court on April 7, 1924 (R. 51). The chief grounds asserted by petitioner in his petition therefor were summarized in the fly leaf to the petition, as follows:

THIS CASE INVOLVES

a construction of the Bankruptcy Act, section 14-b. Under this section of the act, three questions of public importance are erreoneously determined in the present case:

First. Is a bankrupt properly filing an application for discharge entitled of right to his full and complete discharge in the absence of appropriate objection and specification of objection by a party in interest and in the absence of any evidence in support thereof? Notwithstanding the statement by this court that he is, in **Bluthenthal v. Jones,** 208 U. S. 64, it has been held in the present case that he is not.

Second. May a bankrupt be denied a discharge as to debts scheduled in an earlier and still pending bankruptcy proceeding, solely on the ground of laches in failing to obtain a prompt determination of his still pending application for discharge in the earlier proceeding, laches not being one of the six offenses defined in the act for which grounds alone a discharge may be refused? Notwithstanding a line of cases to the contrary, the chief of which is **In re Glasberg,** 197 Fed. 896, decided by the second circuit court of appeals, in the present case it has been held that he may.

Third. May a district judge passing upon an application for discharge go beyond the record in the case before him on his own initiative, "investigate the merits of the application" and deny the application from con-

clusions so reached on a ground not pleaded in opposition? Notwithstanding the decision of the first circuit court of appeals to the contrary, **In re Marshall Paper Co.**, 102 Fed. 872, as well as the long line of decisions to the effect that one opposing a discharge must show by clear and convincing evidence that the bankrupt has committed one of the six defined offenses, it has been decided in the present case that he may.

STATEMENT OF THE CASE.

On November 14, 1922, petitioner was adjudged a bankrupt by order of the District Court of the United States for the Northern District of Texas at Dallas, he having but a few days theretofore filed a voluntary petition in bankruptcy. On February 18, 1923, he seasonably filed application for discharge (R.1). Though he had many creditors, all of whom were duly notified, notice of objection and specifications of objections to such application (R. 1, 2) were filed by only one person, respondent. Neither the objection nor the specifications referred to any other bankruptcy proceeding or order, or based any claim thereon. Petitioner filed exceptions and demurrers to such objection and specifications of objection (R. 3) which were overruled by the referee acting as special master on the question of discharge, to which petitioner excepted (R. 6).

A hearing was regularly had before the special master on April 27, 1923, of which all parties in interest were duly notified (R. 6), at which respondent was present in person, but not represented by attorney; at this hearing respondent proffered in support of his specifications a transcript of testimony of witnesses before a special master taken more than six years before in a bankruptcy proceeding in which petitioner had applied for a discharge (R. 6) and in which specifications had been filed by two creditors, one a cor-

poration meanwhile dissolved, and the other an individual meanwhile deceased (R. 12, 23). Petitioner's objections to the introduction of this in evidence being sustained by the master, respondent then stated that he had no evidence to proffer in support of his specifications and that he did not desire further time within which to procure witnesses or to employ attorneys, since he did not want to "send good money after bad" (R. 6).

The master then on his own motion interrogated petitioner, after which he dictated in open court in the presence of petitioner and respondent, findings that each specification was wholly unsupported by evidence and that evidence contrary to the averments in each specification was uncontradicted, together with a recommendation that the discharge as prayed for be granted (R. 11, 15). In this recommendation, the master referred to the former proceeding to which respondent had adverted, as pending before the district court (R. 11), recommending that the former proceeding be ignored because no claim or right thereunder had been asserted in any objection or specification, nor any reference made thereto, and because no final action had been taken therein. Neither respondent nor any other party in interest made any objection at that time or at any later time to the findings or recommendations; no party in interest has taken any further step in opposition to the discharge.

Such findings and recommendations were filed in the district court on June 7, 1923 (R. 6), and were presented the following day to the court by attorneys for petitioner, there being no appearance in opposition (R. 15). Thereupon the district court entered an order, on June 9, 1923, granting the discharge in part and denying the discharge in part, the denial being as to all creditors listed in the petition in bankruptcy filed by petitioner in the same court in Novem-

ber, 1915, the former proceeding referred to in the master's recommendation (R. 15). A written opinion of the district court was filed at the time of the entry of said order (R. 16), showing that its action was based, not upon any objection or specification, but upon judicial knowledge of the pendency and status of the earlier bankruptcy proceeding (R. 16, 17). The court on its own motion, on the basis of judicial notice only, and being expressly without actual knowledge (R. 16), determined that petitioner by laches in not obtaining a final determination of the long pending proceeding, in which the question of laches had not been raised by any party in interest, had disentitled himself to a discharge in that proceeding and that the question of discharge as to the debts scheduled in it, was therefore *res judicata* in the present case.

After announcement of this opinion, but on the same day, the district court inspected the record in the long pending proceeding and signed an order denying the discharge in that case, acting in so doing solely on the legal proposition that laches disentitled petitioner to a discharge therein (R. 18).

From the order entered in the present case, petitioner seasonably filed a motion for rehearing (R. 18) setting up the legal propositions here asserted (R. 19) and, in addition, facts with reference to the history and status of the other proceeding (R. 20, 33). On the hearing of such motion uncontradicted evidence was introduced by petitioner (R. 34) showing that petitioner had never occasioned any delay in such proceeding, that the objecting creditors therein had long since abandoned their objection and specification and in fact had long since been removed from the field of controversy by death and corporate dissolution, that no other party in interest had ever taken any part in

the proceeding, and that it at the time had not been finally determined, there then remaining undetermined therein a petition for rehearing. No other evidence was introduced (R. 34). The motion herein was overruled on June 18, 1923, and on the same day petitioner perfected his appeal to the fifth circuit court of appeals (R. 35). In that court the cause was heard on brief and oral argument for petitioner, there being no appearance for respondent (R. 40).

By judgment entered November 27, 1923 (R. 43), the action of the trial court was affirmed. The opinion of the court filed with such judgment (R. 40) did not refer to the propriety of denying a discharge on the ground of laches, particularly laches in another case in which the question had never been raised, or to the propriety of denying a discharge on any ground in the absence of appropriate pleading and proof in objection to the application for discharge, but the affirmance was based solely on the proposition that the action of the trial court was justified under the provisions of Section 14-b of the Bankruptcy Act authorizing the judge to "investigate the merits of the application". Since, however, the District Judge did not investigate the merits of petitioner's application, but relied upon laches as a ground for denial of the discharge and a ground for not investigating the merits of the pending application in either of the proceedings, the circuit court of appeals in effect necessarily approved the reasoning of the district court. Petition for rehearing (R. 43) was overruled on December 24, 1923 (R. 50). Petition for certiorari was filed herein, together with a certified copy of the record on February 26, 1924, and the writ of certiorari was granted on April 7, 1924 (R. 51).

The appeal below was based on the following errors of law of the district court (R. 36) which are assigned as

SPECIFICATION OF ERRORS.

1. The court erred in denying a discharge insofar as relating to the creditors listed in the petition of the bankrupt filed in this court in November, 1915, in cause numbered 1211 in bankruptcy, because the specifications of objection filed by the objecting creditor were and are fatally defective and insufficient to raise any issue for determination by the court, the bankrupt therefore being entitled of right to his discharge as prayed for.

2. The court erred in denying a discharge insofar as relating to the creditors listed in the petition of the bankrupt filed in this court in November, 1915, in cause numbered 1211 in bankruptcy, because the specifications of objection filed by the objecting creditor were and are wholly unsupported by any evidence.

3. The court erred in denying a discharge insofar as relating to the creditors listed in the petition of the bankrupt filed in this court in November, 1915, in cause numbered 1211 in bankruptcy, because the specifications of objection filed by the objecting creditor were abandoned and waived, as shown by the record of the proceedings had before the special master, by the absence of exception and objection to the findings and recommendations of the special master and by the absence of appearance in this court of the objecting creditor and of any attorney on his behalf.

4. The court erred in denying a discharge insofar as relating to the creditors listed in the petition of the bankrupt filed in this court in November, 1915, in cause numbered 1211 in bankruptcy, because no objection or specification of objection was filed in this cause by or on behalf of any creditor on the ground that, or averring that, the status of such proceedings numbered 1211 precluded or in

any way affected the granting of the discharge herein as prayed for.

5. The court erred in denying a discharge insofar as relating to the creditors listed in the petition of the bankrupt filed in this court in November, 1915, in cause numbered 1211 in bankruptcy, because there is no showing in this record that there has ever been a final determination in the earlier procedings numbered 1211, that the bankrupt is entitled or is not entitled to a discharge for any ground properly placed in issue in this cause, that is to say, such a final determination as may preclude or in any way affect the granting of a discharge herein as prayed for.

6. The court erred in overruling the motion of the bankrupt for a rehearing of the order denying the discharge in part and in not granting a discharge herein as prayed for on such rehearing, because the uncontroverted evidence proffered by the bankrupt on the hearing of such motion shows that there has been no final determination in the bankruptcy proceedings numbered 1211 in bankruptcy, whether this bankrupt is entitled or is not entitled to a discharge for any ground properly placed in issue in this cause, that is to say no final determination such as may preclude or in any way affect the granting of a discharge herein as prayed for.

POINT ONE.

Petitioner having properly filed an application for discharge, was and is entitled of right to his full and complete discharge in the absence of appropriate objection and specification of objection and in the absence of any evidence tendered in support thereof.

The record contains no objection or specification sufficient to raise an issue as to petitioner's discharge. Peti-

tioner's exceptions and demurrers to the objection and specifications of objection (R. 3) are sufficient, we think, to show this. No evidence supporting any of the specifications is to be found in the record. The findings of the master to this effect (R. 12, 13) have never been challenged. The district court recognized that there was no pleading or proof sufficient to raise an issue by basing its action solely upon judicial notice (R. 16). The circuit court of appeals so recognized, stating expressly in its opinion (R. 41):

> "It is true there was no appropriate pleading to present the issue and that no proof was formally tendered on the hearing. * * *"

The record shows consent to a discharge by all parties in interest. Respondent clearly expressed his abandonment of all opposition at the hearing before the master on April 27, 1923. None of the other parties at interest, though all were duly notified, filed any objection or specification of objection. All were also duly notified of the hearing before the master on April 27, 1923, but none appeared or objected to the findings and recommendations then announced, though they had ample opportunity to do so before the master filed his findings and recommendations in the district court on June 7, 1923. All other parties in interest charged with knowledge of the hearing of April 27th as they were, acquiesced in the abandonment of all opposition to the discharge, having intentionally remained away and refrained from objecting at any stage of the proceeding. The withdrawal of the only objection and specifications of objection, which were in themselves insufficient in law, prior to the introduction of any evidence, and therefore before any party in interest acquired, or could acquire any benefit by representation, made the situation the

same as if no objection or specification of objection had ever been filed. Especially is this true since each party in interest placed himself in the position, by his own conduct, of consenting to the presentation of the application for discharge without opposition.

In this state of the record petitioner was entitled of right on presentation of the matter to the district court to his discharge as prayed for. The Bankruptcy Act, section 14-b, provides:

> "The judge shall hear the application for a discharge and such proofs and pleas as may be made in opposition thereto by the trustee or other parties in interest, at such time as will give the trustee or parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless * * * (he has committed one of six defined offenses)."

From a reading of this statute alone, it clearly appears that the present bankruptcy act entitles the bankrupt to his discharge upon appropriate application, of right, unless he be shown to have committed one of the six defined offenses. By the very form of the law the debtor is discharged, subject only to exceptions which must be established by one, entitled to object, who has filed appropriate objection. The wording of this section is not dissimilar to the words employed in section 17-a (3), considered by this court in **Hill v. Smith**, 260 U. S. 592, wherein an "unless" phrase was held by this court to create an exception, pursuant to which one, if he would bring himself within it, must offer evidence. The language of Mr. Justice Holmes seems equally applicable here:

> "By the very form of the law the debtor is discharged subject to an exception, and one who would bring himself within the exception must offer evidence to do so." 260 U. S. 595.

This court has so construed the statute. It has inferentially done so in promulgating its General Orders and Official Forms, in providing in General Order 32 immediately after the provision relating to the application for discharge:

> "A creditor opposing the application of a bankrupt for his discharge, or for the confirmation of a composition, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file his specification in writing on the grounds of his opposition within ten days thereafter, unless the time shall be shortened or enlarged by special order of the judge."

This order entitled "Opposition to Discharge or Composition" purports to be the exclusive method of opposing an application for discharge; the prescribed manner of opposing is under form 58, which clearly contemplates specifications of objection by parties in interest only; limitations are thus placed upon oppositions, it being inferentially provided that failure to comply with the provisions of the order shall entitle the bankrupt to a discharge, if appropriately applied for.

This court has expressly so construed the statute. In **Bluthenthal v. Jones,** 208 U. S. 64, it was unanimously held that a discharge granted in a second bankruptcy proceeding was valid and binding on creditors in both proceedings notwithstanding a denial of the discharge in the first proceeding, the order granting the discharge being held to be proper in the absence of an affirmative pleading of *res judicata.* The opinion of Mr. Justice Moody, rendered in 1908, states:

> "Section 14 of the amended act, which was applicable to the second proceedings, provides that after due hearing the court shall discharge the bankrupt, unless

he has committed one of the six acts specified in that section. * * * Undoubtedly, as in all other judicial proceedings, an adjudication refusing a discharge in bankruptcy, finally determines for all time and in all courts, as between those parties or privies to it, the facts upon which the refusal was based. But courts are not bound to search the records of other courts and give effect to their judgments. If there has been a conclusive adjudication of a subject in some other court, it is the duty of him who relies upon it to plead it or in some manner bring it to the attention of the court in which it is sought to be enforced. Plaintiffs in error failed to do this. When an application was made by the bankrupt in the district court for the Southern District of Florida, the judge of that court was, by the terms of the statute, bound to grant it, unless upon investigation it appeared that the bankrupt had committed one of the six offenses which are specified in section 14 of the bankruptcy act as amended. An objecting creditor might have proved upon that application that the bankrupt had committted one of the acts which barred his discharge, either by the production of evidence or by showing that in a previous bankruptcy proceeding it had been conclusively adjudicated as between him and the bankrupt, that the bankrupt had committed one of such offenses. If that adjudication had been proved it would have taken the place of other evidence and have been final upon the parties to it. But nothing of this kind took place. Bluthenthal & Bickart intentionally remained away from the court and allowed the discharge to be granted without objection. Since the debt due to the plaintiffs in error was a debt provable in the proceedings before the District Court of Florida and was not one of the debts exempted by the statute from the operation of the discharge, it was barred by that discharge." 208 U. S. 64, 66.

This construction of the statute requiring the district judge on appropriate application for discharge and in the

absence of opposition thereto, to grant the discharge, has been uniformly followed by the lower courts. Excerpts from a few of their decisions to this effect are sufficient:

"When the bankrupt files his petition for a discharge, the only facts pleadable in opposition thereto are those which show that, under the provision of section 14, he is not entitled to a discharge. In other words, it must be shown that he has committed some one of the offenses described; otherwise the judge 'shall' discharge the applicant." **In re Marshall Paper Co.**, 102 Fed. 872, 874, 1st C. C. A. Mass., 1900.

"Under section 14 of the bankruptcy act, the bankrupt is entitled to a discharge, on due application, unless guilty of one of the offenses there specified, and the objector has the burden of proof upon such issue. The question whether the grounds for denying a discharge are wisely so limited cannot enter into consideration when an issue is raised, and the terms of the act are plain that the application is deniable only upon due proof of commission of one of these enumerated offenses." **In re Eades**, 143 Fed. 293, 294, 7th C. C. A. Ill., 1905.

"The bankrupt was entitled to his discharge as a matter of right, unless debarred upon one of the satutory grounds specified by the creditor." **In re McCrea**, 161 Fed. 246, 247, 2nd C. C. A. N. Y., 1908.

"The provisions of the bankruptcy act compel the conclusion that it is the will of Congress that bankrupts be discharged unless objections based upon the specific grounds set forth in the acts of Congress are made good." **In re Johnson**, 215 Fed. 748, 750, D. C. Pa., 1914.

"But a discharge under the present act is a legal right, unless some objection be filed and affirmatively sustained, for reasons specifically enumerated in section 14 of the statute, and not otherwise." **In re Kaufman**, 239 Fed. 305, 306, 2nd C. C. A. Conn., 1917.

"Discharge is a statutory matter. The court, as well as the objecting creditors, is confined to the specifi-

cations of objection." **In re Newmark**, 249 Fed. 341, 342, 2nd C. C. A., N. Y., 1918.

"As a discharge operates merely to extinguish creditors' claims, no one other than a creditor can be a party in interest. Under well recognized rules of pleadings, strangers to the proceeding cannot be heard to object. This theory finds support in the statute. * * * The right of the trustee to file objections is further limited by a later clause in the same subdivision. * * * This conclusion is further confirmed by an examination of rule 32 of the General Orders in Bankruptcy announced by the Supreme Court and which we think inferentially limits the right to file objections to creditors. The foregoing citations would seem to deny to referees the right to interpose objections to discharges, as well as clearly recognizing the right of a bankrupt to a discharge, except in those cases where objections are filed and after full hearing the court determines that one of the six specified grounds for refusing a discharge exists. * * * Nor should the court on its own motion interpose objections to the discharge; for courts do not create issues. They sit to try and determine them upon presentation of the evidence by the parties interested. We conclude that in all applications seasonably made, where no objections are filed, the discharges should follow as a matter of right." **In re Walsh**, 256 Fed. 653, 7th C. C. A. Wis. 1919.

"Discharge and objection are statutory. The bankrupt is entitled to discharge, unless the objection comes within the statute. It does not in the instant case. The objection is overruled, and discharge is granted. **In re Plank**, 289 Fed. 900, D. C. Mont., 1923.

Courts of bankruptcy throughout the country have been construing the statute uniformly to this effect in their everyday practice. Repeatedly the question of law has been raised, whether the one filing an objection was entitled to oppose the discharge, and courts have always passed on

this question as if controlling on whether a discharge should be granted, and have assumed in consonance with their everyday practice that if the objection or specifications were not appropriately filed, the bankrupt was entitled of right to his discharge; the most recent case wherein both the district court and the appellate court assumed this without discussion, is **In re Feuer**, 4 Fed. (2nd) 892, 2nd C. C. A. Conn., 1925. Similarly, questions have repeatedly been raised whether the objections or specifications of objection were filed in proper time, and it has repeatedly been held that, if not, the objection or specification should be ignored and the bankrupt be given his discharge the same as if it had not been filed; an illustration of this accepted practice is **In re C. H. Kendrick & Co.**, 226 Fed. 890, D. C. Vt., 1915. Similarly, courts have consistently required that the specifications be, as their term implies, specific and definite to the end that the bankrupt may know in detail the charges made which, if established, would result in the denial of his discharge, and have stricken specifications not meeting such requirements and thereupon, unless other specifications be appropriately filed, have granted the discharge as if no specifications had been filed; cases illustrating this general practice are:

In re Phillips, 298 Fed. 135, D. C. Oh., 1924;
In re Slatkin, 286 Fed. 242, D. C. Mich., 1923.

Moreover, when specifications have been duly filed by one entitled to prosecute the opposition, the courts have further required that the charges thus specified be established by evidence offered by a party in interest opposing the discharge. It has been uniformly held, and there are a great many cases on this point, that the burden of proof rests upon the creditors; one or more decisions to this effect have been rendered by each of the circuit courts of appeals; de-

cisions to this effect by the circuit court of appeals which decided this case are:

Humphries v. Nalley, 269 Fed. 607, 5th C. C. A. Ga., 1920;

Garry v. Jefferson Bank, 186 Fed. 461, 5th C. C. A. Ala., 1911;

Hardie v. Swofford Bros. Dry Goods Co., 165 Fed 588, 5th C. C. A. Tex., 1908.

Reported decisions evidencing the practice of courts of bankruptcy in the particulars mentioned are numerous; but of course unreported decisions, made almost daily by district judges and by referees, wholly consistent with the principles stated, are legion.

To what purpose shall it be held that only persons designated by the statute may oppose the application for discharge, that they may oppose it only by specific pleading filed within a definite time, and that upon so tendering an issue they must establish their allegations before the discharge may be denied, if a court, in the absence of any or all of these requirements, may on its own initiative in absence of opposition deny the discharge? The affirmance of the present case by this court must involve, therefore, the overturning of these several consistent lines of decisions long established and uniformly followed and consequently would effect a revolution in the practice of courts of bankruptcy on applications for discharge.

The decisions of the lower courts in the present case afford the only illustrations which we have been able to discover under the present act where this overwhelming weight of authority and this commonly accepted practice have been ignored. The opinion of neither of the lower courts in the present case cites any authority which supports its conclusion, the opinion of the circuit court of appeals (R. 40) being devoid of citation, and the opinion of

the district court (R. 16) citing a large number of cases on the definition of *res judicata* in each of which a proper party in interest had appropriately filed specification of objection to the discharge, and had proffered in support of such pleading a court record to evidence and establish *res judicata.*

The history and purposes of bankruptcy legislation demonstrate that this currently accepted practice of discharging a bankrupt of right in the absence of specified objection, should be followed by this court in its disposition of the present case. Each of the successive acts of bankruptcy passed by Congress has been more liberal than its predecessor with reference to discharges, and a comparison of them clearly shows the intent of Congress expressed in its phrasing of section 14-b. The original act of 1800, 2 Stat. L. 19, secs. 34 and 36, permitted a discharge only in cases where dividends to creditors of 75 per cent were possible, and then only if the commissioner should certify to his opinion that there had been a full disclosure of all assets and full performance of all duties of the bankrupt under the statute, and then only if two-thirds of the creditors in number and in value should consent thereto in writing. The strict provisions of this statute in this and other particulars, as against bankrupts, was a cause for its early repeal and the remaining popular disapproval of bankruptcy legislation lasting for many years. The act of 1841, equally short-lived, was more lenient in its provision, 5 Stat. L. 440, sec. 4, that every bankrupt who complied with the obligations imposed by the statute should be entitled to a full discharge unless a majority in number and value of his creditors filed their written dissent thereto, provided, however, that any creditor or other person in interest might appear and contest such right of the bankrupt to his discharge by showing

one of a number of specific violations of the statute. Under this act, as had not been true under the earlier act, creditors were first recognized as exclusively concerned in the question of the discharge, it being held that in the absence of written dissent by the majority of creditors, a specific creditor had to plead and prove a specific ground for a refusal of the discharge: **In re Banks**, Fed. Case No. 958, D. C. N. Y., 1843.

The act of 1867 was yet more liberal, the provision permitting a number of creditors to prevent a discharge by mere dissent for such reasons as to them might be sufficient, being omitted. 14 Stat. L. 531. The pertinent provisions of this act, secs. 29, 31 and 32, were:

> "No discharge shall be granted, or if granted, be valid—if * * * (bankrupt committed any of 17 defined offenses).
>
> And be it further enacted that any creditor opposing the discharge of any bankrupt may file a specification in writing of the grounds of his opposition, and the court may in its discretion order any question of fact so presented to be tried at a stated session of the district court.
>
> And be it further enacted that if it shall appear to the court that the bankrupt has in all things conformed to his duty under this act, and that he is entitled under the provisions thereof, to receive a discharge, the court shall grant him a discharge. * * *"

Under the provisions quoted, the question whether a court in the absence of opposition by a creditor might refuse a discharge, was not one clearly determinable by the mere form of the law, for the law required that conformity by the bankrupt to his duties should appear to the court, and that no discharge should be granted "if" any of the named offenses were committed. Nevertheless, it was repeatedly held under this statute that unless there were proper specifi-

cations of objection, and evidence establishing the commission of one of the defined offenses, the bankrupt should be granted his discharge, the burden of proof resting upon the objecting creditors. Moreover, it was expressly held, **In re Antisdel**, Fed. Case No. 490, D. C. Mich., 1878, that in the absence of such appropriate pleading and proof by a creditor, the court had no right to consider any question as to the discharge, but was bound to grant it as of right; the single case to the contrary theretofore decided was expressly disapproved, the court saying:

> "The better opinion seems to be, that creditors who have been duly notified and make no opposition, are regarded as consenting to a discharge; and that the court will only consider whether the bankrupt has committed an act which would bar a discharge, upon specifications regularly filed in opposition thereto (citing cases). The books are full of cases holding that the specifications must not be vague and general, but distinct, precise and specific and so framed as to advise the bankrupt what facts he must be prepared to meet and resist (citing cases). But of what use all this particularity in framing an issue, if the court may disregard the issue thus framed, and refuse a discharge *mero motu* if it appears that the bankrupt has committed any other act not covered by the specifications?"

Thus the prevailing practice under the previous acts with which Congress was familiar in 1898 when the present act was before it for consideration, involved an immediate discharge of the bankrupt, as a matter of right, if no creditor opposed his discharge. At this time, so far different from earlier days, there was a popular demand for a bankruptcy law for the relief of honest and unfortunate debtors crushed by the panic of 1893, and the difficulties of ensuing years. As Mr. Remington has stated:

> "When Congress passed the law of 1898 the people in general little comprehended the magnitude of the

work done. Its passage was secured chiefly because of its one feature, the release of debts. A great multitude of victims of years of industrial depression were lying stranded on the rocks of hopeless debt. These debtors were skulking along the streets hardly daring to lift their eyes to passers-by lest they might remind some creditor of an almost forgotten if not forgiven debt. Either so or the debtor was doing business under the name of his wife or other relative, or as 'agent' or 'trustee' as he would variously style himself; everybody understanding the real situation except perhaps the courts themselves, whose rules of evidence obliged them often times to find that an experienced business man was merely an agent or trustee for a wife who owned nothing originally and hardly knew where the place she was now made to say she owned was located, and generally knew nothing in particular about it. This was the natural result of the barbarism of a country that had no bankruptcy system, and these debtors living their lives of falsehood and pretense were the legitimate fruits of lack of civilization. These were probably the most potent arguments in securing the passage of the present bankruptcy act; but after all the scope of the work was infinitely broader." I Remington on Bankruptcy, 3rd ed., p. 19.

That this matter of discharges was one of the things with which the drafter of the original bill was chiefly concerned, is shown by the care with which section 13 (now section 14 of the act) as originally introduced, was drawn: 31 Cong. Rec. pp. 2039, 7205. In order to make certain that the discharge should follow as a matter of right in the absence of opposition, apparently, the negative statement of the Act of 1867 that no discharge should be granted "if—", was transformed to a positive statement to which a mandate to the trial judge was added—"the judge shall * * * discharge the applicant unless—". The seventeen defined offenses in the Act of 1867 were reduced in the bill as originally intro-

duced to nine, and after repeated amendment prior to passage there remained on enactment of the law only two offenses upon proof of which a discharge might be denied: 30 Stat. L. 550. In view of this legislative history, the language of section 14-b, clear on its face, renders indisputable the proposition that the bankrupt must be given his discharge in the absence of appropriate opposition by creditors as specifically provided for in the act.

By amendments to the Bankruptcy Act passed by Congress since 1898, Congress has clearly demonstrated its intent that this right to a discharge in the absence of opposition by creditors shall continue. By amendment of section 14 of the Act, in 1903, 32 Stat. L. 797, four additional offenses were added, proof of which on appropriate objection should justify a refusal of a discharge; the identical language, however, which so clearly shows that in the absence of such proof discharge should be granted, was re-enacted. This was true also of the amendment of 1910, there being added a provision to the section by this amendment that the trustee might interpose objections, providing he should be authorized to do so by a meeting of the creditors: 36 Stat. L. 840. By this amendment also, section 58 was amended, giving creditors thirty days notice of application for discharge instead of the ten-day notice theretofore provided. In this legislation of 1910, Congress showed even more clearly than before its intention that the creditors should determine whether any objection to the discharge should be filed, and that in the absence of any action by creditors in filing objection themselves, or in authorizing the trustee to do so, the discharge should be granted of right. Congress could not say more clearly that creditors exclusively shall determine whether there shall be any issue raised or whether the discharge shall be granted without opposition.

Were there any possible doubt as to the intent of Congress, this court should indulge every presumption to support the current bankruptcy practice, for it is consistent with our fundamental concepts of litigation, whereas any other rule permitting a court to deny a discharge in the absence of opposition would violate principles of Anglo-Saxon law which we have so cherished that many of them have been written into our Bill of Rights. A person charged with commission of an offense justifying a denial of his discharge should be held secure, in bankruptcy proceedings as certainly as in criminal prosecutions governed by the provisions of the Sixth Amendment to the Constitution, in his right to be informed, specifically and in writing filed as a part of the proceeding, of the nature and cause of the accusation; to be confronted in open court with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

To permit a judge to become an objecting party in interest, is to permit him to disqualify himself from the traditional functions of a court and to grant him an unbounded discretion. An order denying a discharge is, in effect, not appealable if such an order is not reversed when the record shows no pleading and no evidence of the commission of any offense.

Though he was then speaking of the provision of the Bankruptcy Act relating to adjudications in involuntary proceedings, the language of Mr. Justice Sanford is equally applicable here:

> "Such a proceeding, as any other litigated matter, requires adversary parties; and manifestly, in the very nature of things, can only be continued as long as there are adversary parties." **Meek v. Centre County Co.**, 264 U. S. 499, 503.

POINT TWO.

There being no pleading and no proof thereof, the district court erred in denying the discharge in part because of the status of another bankruptcy proceeding, especially since the status of such other proceeding was such as not to justify a court in taking judicial notice as a basis for denying the discharge, on its own initiative and in the absence of any opposition by any party in interest.

At the time of the presentation of the record of proceedings before the master to the district court, including the findings and recommendations of the master, there was no opposition on the part of any party in interest to the granting of the discharge to the bankrupt. There had been an objection and specification of objection filed by respondent which had been abandoned by all parties in interest; this opposition did not plead as a bar to the discharge or even refer to any other bankruptcy proceeding, and in fact did not appropriately plead any ground for opposition and hence no evidence on the issue of discharge was admissible. No evidence relating to such other proceeding was proffered by any party in interest other than the proffer by respondent at the hearing before the master of the stenographic report of the testimony of witnesses given more than six years before in the other proceeding, which proffered evidence was excluded from the record by the master, respondent then stating that he had no evidence to proffer. As above detailed, there was and is no opposition to the discharge in this proceeding by any party in interest, either by pleading or by proof.

If, contrary to all authorities on the question, it is ever proper for a court of bankruptcy to consider evidence on the question whether a discharge appropriately applied for should be granted when there is no pleading in opposition

and no evidence offered by any party in interest, it would seem clear that the court should not go further than to examine witnesses and to introduce documentary evidence, subject to a cross-examination of the witnesses by the bankrupt, an explanation of the documentary evidence, if possible, and the introduction of other evidence in rebuttal. Such a proceeding, for example was that which the master in the present case adopted in examining the bankrupt on his own motion without objection by the bankrupt (R-7). Even such procedure is improper, since the hearing is held without giving to the bankrupt the opportunity to produce witnesses, which he would have if proper specifications were filed in advance of the hearing and since it renders the judge or master a party litigant rather than a court.

But to go beyond such procedure, as the district judge did in the present case, violates much further the fundamental rights of the bankrupt; for the district judge, after a hearing has been held by the master for the introduction of all evidence on the subject, without notice being given to the bankrupt that further evidence might be introduced against him or be treated by the court as if introduced and in the absence of opposition by any party in interest, to consider as if in evidence either testimony of witnesses or documentary evidence, including court records, denied the bankrupt an opportunity to explain or rebut the evidence considered.

For the same reason that such action by the district court was erroneous, courts have uniformly held, not only in bankruptcy matters but generally, that *res judicata* when relied on as a defense in bar must be specifically pleaded and then established by evidence regularly introduced. If *res judicata* be relied on not as a complete bar but to establish conclusively an issue of defense, the generally ac-

cepted rule, equally applicable to bankruptcy law, is that though the order or judgment relied upon need not be specifically pleaded any more than any other documentary evidence, nevertheless the ultimate issue which is sought to be established by virtue of it must be appropriately pleaded and the order or judgment must be appropriately proffered in evidence. **Southern Pacific R. R. Co. v. U. S.**, 168 U. S. 1, 57. Within one of these two rules, every case of *res judicata* falls; and in one sense or the other it is true that in every case, *res judicata* must be pleaded and proved.

Is a final order denying a discharge in some other proceeding relied upon by a party in interest as a complete bar to the consideration of the application? Following the general rule, it seems clear that if so, the party in interest must specifically plead the final order relied upon:

United States v. Bliss, 172 U. S. 321, 1898;
Graff Furnace Co. v. Scranton Coal Co., 266 Fed., 798, 801; 3rd C. C. A., Pa., 1920;
In re Youtsey, 260 Fed. 423, 433, D. C. Oh. 1916.

There is no reason why this general rule requiring a specific pleading of a final order or judgment before it may be considered in evidence as a bar on the theory of *res judicata*, should not apply to bankruptcy law. Courts have uniformly applied the rule to discharged bankrupts, requiring that they specifically plead and prove their discharge, failing in which judgment may be rendered against them on a discharged debt. The reason for this was well stated by Mr. Justice Miller, in speaking for this court:

> "We are of opinion that, having in his hands a good defense at the time judgment was rendered against him, namely, the order of discharge, and having failed to present it to a court which had jurisdiction of his case, and of all the defenses which he might have made, including this, the judgment is a valid judgment, and that

the defense cannot be set up here in an action on that judgment." **Dimock v. Revere Copper Co.**, 117 U. S. 559, 566.

This court has recently referred to the matter again and has expressed the general rule:

> "The order of confirmation (of a composition) becomes in effect a discharge and is pleaded in bar with like effect." **Cumberland Glass Co. v. DeWitt & Co.**, 237 U. S. 447, 452.

If a discharged bankrupt must plead his discharge in bar, an opposing creditor who has successfully secured a denial of a discharge, should be required to plead the final order of denial in bar. The order denying a discharge is not of greater dignity or force than the order granting a discharge. Each order is one that determines, as its ultimate issue between the bankrupt and the creditor, whether the debt shall be enforceable.

So far as shown by reported decisions, with the exception of the two opinions in the present case, bankruptcy courts have uniformly so held, there having been in each of the cases in which an objection to discharge on the ground of *res judicata* has been sustained, a specific pleading of the order denying the discharge or of the equivalent failure of the bankrupt to apply for a discharge within the statutory period. Of the many cases to this effect illustrating this commonly accepted practice of specifically pleading the previous proceeding, it is sufficient to refer to **Bacon v. Buffalo Cold Storage Co.**, 193 Fed. 34, 5th C. C. A. Tex., 1912. It is to be noted that in that case the same judge who wrote the opinion for the circuit court of appeals in the present case, after quoting from the opinion in Bluthenthal v. Jones, as have we, said:

> "From this it appears to be required that the granting of the discharge under a second petition be resisted

by objecting creditors having claims provable under a first petition."

This court denied a writ of certiorari in that case, 225 U. S. 701.

We submit that this accepted practice of requiring a specific plea of the former discharge proceeding is commendable, since it assures that the bankrupt shall have an opportunity to know in advance of the hearing the specific contentions of his opposing creditors as the General Orders, promulgated by this court, contemplate.

Perhaps, however, as suggested by Mr. Justice Moody, it is sufficient for an objecting party in interest to plead only the ultimate fact, the commission by the bankrupt of one of the six offences defined in the act and then on the hearing to offer in support of his allegation an order denying the bankrupt a discharge from the debts in question on account of his commission of the alleged offence. Quoting again the language of Mr. Justice Moody:

> "If there has been a conclusive adjudication of a subject in some other court, it is the duty of him who relies upon it to plead it or in some manner bring it to the attention of the court in which it is sought to be enforced * * *. An objecting creditor might have proved upon that application that the bankrupt had committed one of the acts which barred his discharge, either by the production of evidence or by showing that in a previous bankruptcy proceeding it had been conclusively adjudicated, as between him and the bankrupt, that the bankrupt had committed one of such offenses. If that adjudication had been proved, it would have taken the place of other evidence and have been final upon the parties to it." **Bluthenthal v. Jones**, 208 U. S. 64, 66.

If this practice meets the approval of this court, and it is therefore, unnecesary that the previous bankruptcy

order be specifically referred to, in the specification of objection, nevertheless it is essential, prior to the introduction in evidence of such record, that there be appropriate specification of objection to which the record of the previous proceeding shall be relevant. When there is presented to the bankruptcy court no specification of objection, as in effect there was none in the present case, it necessarily follows that the record in the earlier proceeding is not admissible in evidence, even if offered by a party in interest. Under such circumstances, as in the present case, the bankruptcy court is "bound to grant" the discharge as applied for, as Mr. Justice Moody stated, not only because of the specific provision of section 14-b to that effect, but also because of the absence of pleading justifying the consideration in evidence of any record in the former proceeding.

In the absence, therefore, of specific pleading setting up as *res judicata* the proceedings in the other bankruptcy case, and in the absence of the introduction in evidence of such records to support the appropriate specification of one of the six offences defined in the act, it was error for the district court to deny the discharge because of the status of the other proceeding. The decision of this court in **United States v. Bliss,** 172 U. S. 321, is directly in point to this effect. On appeal by the United States from a judgment rendered by the court of claims, this court held that the record of evidence did not justify the recovery. There had been attached to the record, however, a stipulation signed by attorneys for both parties, agreeing to the correctness of an attached record of another case between the same parties in the same court, containing findings of fact and a judgment for petitioner from which no appeal had been taken and the time for taking an appeal had expired;

it was contended that the findings of fact and the judgment with which the court of claims was familiar as part of its records, established the right of petitioner to the recovery. This court unanimously overruled this contention, it being stated in the opinion of Mr. Justice Brewer:

> "Upon this the doctrine of *res judicata* is invoked to uphold the judgment. A sufficient answer is that neither by pleading nor evidence were the proceedings in this other case brought before the Court of Claims in the present suit. If a party neither pleads nor proves what has been decided by a court of competent jurisdiction in some other case between himself and his antagonist, he cannot insist upon the benefit of *res judicata*, and this although such prior judgment may have been rendered by the same court." 172 U. S. 321, 326.

It was a holding necessary to this result that the court of claims erred in rendering judgment based on such former record when there was neither pleading nor evidence to support it, for if it had been proper for the court of claims to take judicial notice of such former record, it would have been presumed in support of its judgment that such proper judicial notice had been taken.

So, in the absence in the present case of pleading and proof of the status of the other bankruptcy proceeding, it was error for the district court to take judicial notice thereof. There was no occasion for judicial notice. Issues not raised by the parties, may not be raised by the court. This court has repeatedly so held, a leading case citing other decisions by this court to this effect, being **Mutual Life Insurance Co. v. McGrew**, 188 U. S. 291, in which Mr. Chief Justice Fuller, speaking for this court, stated:

> "Nor can this failure to claim under the treaty be supplied by judicial knowledge. We so held in Mountain View Mining & Milling Co. v. McFadden, 180 U. S.

533, where we ruled that judicial knowledge could not be resorted to to raise controversies not presented by the record; and Professor Thayer's Treatise on Evidence was cited, in which, referring to certain cases relating to the pleadings and matters of record it was said 'that the right of a court to act upon what is in point of fact known to it must be subordinate to those requirements of form and orderly communication which regulate the mode of bringing controversies into court, and of stating and conducting them.' Arkansas v. Kansas & Texas Coal Co., 183 U. S. 185, 190. That rule must necessarily govern us in passing on the question of our appellate jurisdiction under section 709." 188 U. S. 291, 312.

If there is no pleading rendering admissible in evidence an order or judgment as *res judicata*, it is improper for a court to take judicial notice of it.

Moreover, if there is such pleading, judicial notice should not be taken of proceedings in any other case, even if between the same parties, involving the same issues, before the same judge; for it is the duty of parties to introduce such part of the records of other proceedings, as will establish their allegations of *res judicata*, and the court should not assume the attitude of a partisan in selecting such parts of a record and in giving effect thereto. If a party does not offer in evidence the parts of the record relied upon, and the court considers, without such offer, the former proceedings in evidence to the same effect as if formally introduced, his adversary does not have adequate opportunity to challenge the relevancy of the record or to explain or rebut that of which judicial notice is taken. For these reasons it is held, according to the decided weight of authority, that judicial notice of proceedings in another case will not be taken though relevant to an issue made by the pleadings, and even though the other

case be in the same court, between the same parties and involving the same issues raised:

Murphy v. Citizens Bank, 100 S. W. 894, Sup. Ct. Ark., 1907;

Pacific Iron & Steel Works v. Goerig, 104 Pac. 151, Sup. Ct. Wash., 1909;

Pickens v. Coal River Co., 65 S. E. 865, Sup. Ct. App., W. Va., 1909;

Matthews v. Matthews, 77 Atl. 249, Ct. App. Md., 1910;

Ollschlager's Estate, 89 Pac. 1049, Sup. Ct., Ore., 1907;

If the reasoning of these cases be accepted, it follows the more clearly that where there is no pleading of the same issue, and especially where there is no issue raised by the pleading at all, judicial notice should not be taken. For judicial notice functions to give a court facts relevant to issues raised by the parties, not otherwise in evidence; it is in lieu of evidence and is subject to the same restriction as all other evidence, that it should not be considered unless relevant to an issue raised by the pleadings.

Even in cases in which judicial notice may properly be indulged, its exercise is a matter of discretion. As stated in the excerpt quoted from the opinion of Mr. Justice Moody, it is not the duty of a court to search the records in other cases, and according to the quotation from the opinion of Mr. Justice Brewer, this is equally true though the prior proceeding be in the same court. Professor James B. Thayer, whom this court has frequently recognized as an authority on the law of evidence, has said:

> "Courts may judicially notice much which they cannot be required to notice. * * * This function is indeed a delicate one; if it is too loosely or ignorantly exercised, it may annul the principles of evidence, and even of substantive law." Thayer, Preliminary Treatise on Evidence at the Common Law, p. 309.

Such a discretion, it is well recognized, should be exercised for the promotion of justice and the courts should refuse to take judicial notice where its invocation will result in an unfair or improper result.

> "Courts are not bound to take judicial notice of matters of fact. Whether they will do so or not depends upon the nature of the subject, the issue involved and the apparent justice of the case." **Hunter v. N. Y. O. & W. Ry. Co.**, 116 N. Y. 615; quoted and followed in **City of St. Louis v. Niehaus**, 236 Mo. 8.

For three reasons the district court should not have exercised such a discretion, if it had any authority to take judicial notice of the prior bankruptcy proceeding in the absence of any pleading opposing the discharge in the present case; first, the matter of discharge had not been finally determined in the proceeding of which judicial notice was taken; secondly, the conclusion of the district judge that the bankrupt had disentitled himself to a discharge therein by laches, was erroneous as a matter of law and fact; thirdly, the denial of the discharge in that case, as in the present case, would effect an injustice to petitioner.

In the first place, an order denying discharge is final in the sense that it is appealable and is not deprived of that finality by the filing of a motion thereafter. By the weight of authority it is held, however, that such an order is not a proper predicate for pleading and proof of *res judicata*, unless it also be shown that appeal therefrom has been disposed of or cannot be taken, for unless that is shown, the issue is not shown to have been determined between the parties. To sustain a plea of *res judicata* on proof of an order or judgment in an earlier proceeding from which an appeal is shown to be pending, or a motion which may serve

as a predicate for an appeal, is erroneous according to the weight of authority:

Texas Trunk Ry. Co. v. Jackson Bros., 85 Tex. 605, 1893;
Blue Goose Mining Co. v. Northern Light Mining Co., 245 Fed. 727, 9th C. C. A. Cal. 1917.

Such is shown to be the status of the bankruptcy proceeding of which the district court took judicial notice in the present case; an order denying the discharge was entered, but a motion for rehearing which had not been acted upon was still pending at the time the trial court acted in the present case (R. 34), in overruling petitioner's motion for rehearing herein. It is to be noted that the pendency of such motion in the other proceeding was urged as a ground for petitioner's motion for rehearing herein and that the motion in this case was overruled, but not the motion in the other proceeding. The district judge had control of the cases on his docket; in permitting the present case to be submitted to him first, in overruling the motion for rehearing herein while the motion in the other case remained pending and in permitting such motion to remain pending during the prosecution of this case on appeal, the district judge evidenced a desire that the question of law on which he acted in the other proceeding, as shown by his opinion herein, be tested by appeal of the present case. The matter of discharge in the other proceeding is not shown by the record to have been determined against petitioner, with that finality justifying a denial of a discharge herein solely on that ground.

Secondly, the court in its opinion herein clearly shows that the denial of the discharge in the other proceeding is on the ground of laches and on that ground alone. The laches in the earlier proceeding is referred to by the district judge as the sole ground for denial of the discharge in the

present case. This question of laches was not raised by any party in interest in the other proceeding (R. 32), or in this proceeding.

This action of the district judge was erroneous, because laches is not a ground for denial of a discharge. The bankruptcy act specifies six grounds for which a discharge may be denied, and these grounds have been uniformly held to be exclusive. Laches, not being one of them, will not justify an order denying a discharge. The leading case to this effect is **In re Glasberg**, 197 Fed. 896, 2nd C. C. A. N. Y., 1912, wherein a motion of an objecting creditor to dismiss the application for discharge on the ground of laches was held to have been improperly granted by the district court; it was said in the opinion:

> "Delay in bringing on the hearing is not a ground for refusing a discharge found in the act. It specifically enumerates what the grounds are and this is not one of them." 197 Fed. 896, 897.

To the same effect, it has been held:

> "Laches of the bankrupt in not bringing on a trial of the issues raised by a creditor's opposition to his application for discharge is not one of the enumerated causes and the court is not authorized to extend the provisions of that section and refuse a discharge upon any other grounds than those therein set forth." **In re Wolff**, 132 Fed. 396, 397, D. C. Cal., 1904.
>
> "It will be observed that the language of section 14-b is directed wholly to the judge and not to the bankrupt and is mandatory in its terms. * * * To dismiss this application unheard would be simply to fly in the face of this mandate. The fact that from some unknown cause the hearing was not had seasonably will not warrant the judge in refusing to hear at all, in declining to investigate the merits of the application, or to discharge the applicant. It would be to amend the statute and add

another specification to the grounds for refusing a discharge, to penalize a want of diligence in pressing for a hearing as heavily as the commission of the crimes and frauds mentioned in the section. A bankruptcy case is one in equity. The extreme penalty for negligence in failing to press for a trial as fixed by Equity Rule 57, is dismissal without prejudice; but a dismissal of this application would be to bar a discharge entirely, for a new application could not now be filed in this case, nor could these debts be discharged even by another bankruptcy." **In re Neal**, 270 Fed. 289, 290, D. C. Ga., 1921.

The reasoning of these decisions is consistent with the line of decisions placing the burden of proving the specifications of objection on the objecting creditors. For from the time of filing specifications of objection, the burden of proof rests upon the creditors, and not upon the bankrupt, and the bankrupt not being the proponent of the issue raised, has no duty to see that the issue is presented to the court.

The district court could not, therefore, because of delay in the earlier proceeding, deny petitioner his discharge therein; more clearly is it true that in the present case the district court could not treat the earlier case as a basis for *res judicata*, when it is considered that the question of laches was raised by the court in each proceeding on its own motion and determined on the basis of judicial notice only.

If delay were a possible ground for denying a discharge, certainly the delay should be explainable, and a bankrupt should, after having been given the notice to which he is entitled by pleading filed before a hearing, have the opportunity in open court to examine and cross-examine witnesses, to explain the delay and to rebut any presumption that might appear from a prima facie showing of neglect. The action of the district court in taking judicial notice of the

delay deprived the bankrupt of these rights and involved a judicial notice, not merely of the facts shown by the record in the other proceeding, but of facts not a part of such record, namely, that the causes for the delay did not and could not justify it. If a court has a discretion to consider by judicial notice the status of another proceeding in bankruptcy, though an application for discharge pending before it is without opposition, the exercise of the discretion to deny a discharge in one case because of an unalleged and unproved laches in another case, is unjust and should not meet the approval of this court.

Finally, if the district court could look to the facts of record relating to the other proceeding, to determine whether in its discretion judicial notice of such other proceeding should be taken, this court must necessarily look to the same record of proceedings to determine whether that discretion was properly exercised. To this end all of the relevant facts with reference to the other proceeding are shown in the present record by uncontradicted evidence introduced on petitioner's motion for rehearing herein (R. 34). This uncontradicted evidence clearly shows, we submit, that petitioner is entitled in justice to his discharge. The only specification of objection in the long pending proceeding (R. 32) was that the bankrupt failed to keep books of account or records with intent to conceal his true financial condition, and that he destroyed books of accounts or records from which such financial condition might be ascertained. The uncontradicted evidence is that no books or records were destroyed, but that all books and records were delivered by the bankrupt to the trustee in bankruptcy who had them prior to the war (R. 7), and that the trustee went away during the war and upon his return thereafter that the books and records could not be found. In the ear-

lier proceeding there was testimony of many witnesses heard by a master who died before he made any findings or recommendations (R. 22). A new referee in bankruptcy, without having been specifically designated as master in such proceeding, who had never heard the witnesses testify, and had never seen the books and records, made a recommendation that the discharge be denied, based on an unsigned memorandum of the deceased master (R. 32), which that master had exhibited to attorneys for petitioner as a tentative recommendation, but which he later agreed would not be made until a further hearing (R. 22). Meanwhile several years passed, after the hearing before the deceased master in February, 1917, without any activity on the part of any party in interest in opposition to discharge. The only objecting creditors, two in number, had withdrawn from the field of opposition, one an individual having died, and the other a corporation having been dissolved (R. 23), and no action had been taken by them or any other party in interest for more than six years. During the entire time, the bankrupt did nothing to delay or postpone a hearing (R. 23). The absence of opposition continued from February, 1917 until June 9, 1923, when the court on its own motion called the matter for consideration without appearance by any objecting party in interest and entered an order denying the discharge solely on the ground of laches. Such facts show, we submit, that all opposition to the discharge in the long pending proceedings had been abandoned long prior to 1923, and that, at that time, the record was the same as if no objection had ever been made; that the loss of the books and records which constituted the best evidence on the issue raised in 1917, together with the death of the master who had seen the witnesses on the stand, made it unfair and unjust to deny the discharge in

1923 when all opposition had disappeared; and that the laches of the bankrupt which was the sole ground for action by the district judge, did not exist in fact, the delays having been occasioned exclusively by the want of prosecution of the objections by the parties having the burden of proceeding on that issue.

We submit that the district court, if it had within its discretion the right to look to such other proceeding and to deny a discharge herein because of its status, should not have exercised the discretion and that this court, having whatever of discretion the district court possessed, should refuse to affirm the unjust order resulting.

POINT THREE.

Since a district judge, in passing on an application for discharge may not go beyond the record in the case before him, "investigate the merits of the application" on his own initiative, and deny the application from conclusions so reached, and since the denial of the discharge in the present case was not based upon any investigation of the merits, the affirmance of this case by the circuit court of appeals was erroneous.

Our entire argument under the first point is addressed to the proposition that the district court was obligated by the terms of the act, to grant the discharge to petitioner as prayed for, in the absence of opposition. All the authorities and arguments there presented support the proposition that the district judge may not "investigate the merits of the application" by going beyond the record in the case before him. The mandate to the district judge contained in section 14-b that he shall investigate the merits of the application is clearly limited by its context, the district judge being directed to investigate only the record of the case

before him, and not to go beyond such record to indulge in a personal investigation which, of its nature, could not be made a part of the record and which would or might descend to the level of inquisition or of caprice. The wealth of authority in point which we have heretofore discussed, demonstrates beyond question that this was not the intent of Congress in its use of the terms "investigate the merits." As Mr. Justice Brandeis has recently said:

> "It is not lightly to be assumed that Congress intended to depart from a long established policy." **Robertson v. Railroad Labor Board,** 267 U. S. ....., 45 S. Ct., 621, 624.

In only one reported case other than the present, has the phrase in the statute been construed to grant to a district judge the right to make a personal investigation, outside of the record, of the merits of the application. Judge Lowell, sitting in the District Court of Massachusetts, held that there was no merit in the application for a discharge, **In re Marshall Paper Co.,** 95 Fed. 419, basing his refusal on a ground not specified by creditors, saying:

> "It should be observed, however, that under the existing bankruptcy act, the duties of the judge regarding discharge, are more onerous than those imposed by the act of 1867. He is directed to 'investigate the merits of the application' and hence is not confined to the consideration of those objections to the discharge which are properly set forth by creditors." 95 Fed. 419, 422.

The first circuit court of appeals, after carefully considering the purpose and effect of the clause in the statute relied upon by the district judge, unanimously reversed this case. After quoting section 14-b of the bankruptcy act and stating that the bankrupt is entitled to his

discharge as a matter of right, provided he has not committed one of the offenses enumerated, the court said:

> "By this provision, the judge shall hear the application and discharge the applicant unless he is found guilty of some one of the prescribed offenses. The court is not authorized to deny the application for discharge upon a ground not set forth in this section. In re Black (D. C.), 97 Fed. 493. A refusal to grant a discharge cannot be said to rest in the discretion of the judge. The words, 'investigate the merits of the application,' must be taken in connection with the context. To construe these words as if they stood alone and disconnected from what follows would be to leave the whole question of discharge in the discretion of the court. Looking at the entire section, we do not think these words will bear such a construction, however desirable it may seem to the court in a particular case to so interpret them. It seems to us that Congress in this section clearly specifies the only causes for which a discharge can be denied, and leaves to the court the sole duty of deciding, after due hearing, whether such cause exists.
>
> "When the bankrupt files his petition for a discharge, the only facts pleadable in opposition thereto are those which show that, under the provisions of section 14, he is not entitled to a discharge. In other words, it must be shown that he has committed some one of the offenses described; otherwise the judge 'shall' discharge the applicant." **In re Marshall Paper Co.**, 102 Fed.872, 874.

This decision has been cited with approval in many subsequent cases, though in none of them does the question now under discussion appear to have been raised.

Were a personal investigation by the district judge permissible, however, the present case may not be affirmed on such basis, for it is shown by the opinion filed by the district judge herein that his denial of the discharge in part, is based on the laches of petitioner in not obtaining a hear-

ing in another proceeding of his application for discharge therein pending. For the various reasons presented under our second point, such action by the district judge was erroneous. Under no possible conception can it be said that his action involved a personal investigation of the question whether petitioner was entitled as a matter of morals, or of justice, to his discharge.

Nor is there involved in the present proceeding, as the opinion of the circuit court of appeals indicates, any abuse of the process of the courts. There is, in substance, the same sort of controversy here involved as there would be if Atkins were prosecuting a suit against Freshman on his debt. The question in this and in the hypothetical case is, whether the debt of Freshman to Atkins is and shall remain a subsisting obligation. The court is not a guardian or trustee for either of the parties in either case. Atkins, let us assume, filed suit, and upon a trial, after due hearing, it was finally determined that he should take nothing. If thereafter Atkins should bring a second suit on the same indebtedness, it would be the duty of the court clearly, if Freshman did not plead *res judicata*, and was in default, to render judgment for Atkins on the same claim which had been previously determined to be unfounded. In the hypothetical case, the duty was upon Freshman to plead his defense of *res judicata*, or otherwise to avoid default in the second suit. If, by assuming the hazard of court costs and expenses in the second suit, Atkins should thus obtain a judgment by default, the judgment would nevertheless be valid. Courts have uniformly so decided. *Res judicata* must be pleaded and proved. With even greater reason, the courts have also decided uniformly that the defense of a suit pending must be pleaded and proved, or else is waived.

Of course if there is a multiplicity of litigation, either instituted or threatened, equity may in proper circumstance intervene with an injunction. An injunction properly applied for in bankruptcy proceedings should protect parties in interest against any injustice which, in the opinion of the circuit court of appeals, would seem to follow from an affirmance of the present case.

The parties to the present proceeding, as to all other litigation, should be left on their own resources to protect themselves by the remedies which are afforded them at law and in equity, without the intervention on their behalf of courts; for an intervening judge raising issues not raised by the parties themselves, is a partisan and not a court. Every possible issue as to a discharge, as all other litigation, is dependent upon the existence of adversary parties.

CONCLUSION.

In the premises, petitioner submits that the orders herein of the district court and of the circuit court of appeals are erroneous and should be reversed, and prays that by order of this court all such orders be reversed and this case remanded with appropriate instructions.

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Dallas, Texas,
September 10, 1925.